



1978

Multple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems

Noel Hensley

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Noel Hensley, *Multple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw L.J. 669 (1978)
<https://scholar.smu.edu/smulr/vol32/iss2/4>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

MULTIPLE PARTY LITIGATION IN COMPARATIVE NEGLIGENCE: INCOMPLETE RESOLUTION OF JOINDER AND SETTLEMENT PROBLEMS

by Noel Hensley

Although article 2212a,¹ the Texas comparative negligence statute, became effective in September 1973, the courts have not yet confronted all of the problems its provisions pose. In particular, the multiple party joinder and settlement provisions are troublesome because they are inconsistent with the basic theory of comparative negligence. This Comment examines Texas' comparative negligence joinder rules which allow incomplete apportionment of negligence, and considers settlement provisions which may result in heightened fault determinations and damage apportionments for nonsettling defendants. Additionally, the Comment notes alternative procedures, including those practiced in other jurisdictions, for allocating negligence and liability more fairly among all tortfeasors.

I. TEXAS' SYSTEM OF COMPARATIVE NEGLIGENCE

In recent years comparative negligence has been increasingly adopted as a means of reforming certain common law rules of negligence.² By implementing some form of the comparative negligence doctrine,³ states are seeking to alleviate the harsh effect of contributory negligence⁴ which completely bars

1. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978) [hereinafter cited as art. 2212a].

2. Twenty-six states have enacted some form of comparative negligence statute, while Florida, California, and Alaska have adopted the doctrine judicially. For judicial evaluations of forms of comparative negligence, see *Kaatz v. State*, 540 P.2d 1037 (Alas. 1975); *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

3. There are three basic kinds of comparative negligence systems. The "pure" form allows a contributorily negligent plaintiff to recover even when his negligence was greater than the defendants' negligence, with his proved damages reduced in proportion to the amount of negligence attributable to him. This form is adopted by statute in Mississippi, New York, Rhode Island, Washington, Puerto Rico, and the Canal Zone, and reflected in several federal acts, including the Federal Employers' Liability Act, the Jones Act, the Death on the High Seas Act and the Merchant Marine Act. Pure comparative negligence has also been adopted by judicial decision in California, Florida, and Alaska. See C.R. HEFT & C.J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* §§ 3.10-.580 (1971 & Supp. 1977).

The "50% bar" type of modified comparative negligence allows a recovery by the plaintiff if his contributory negligence is less than defendants' and is in effect in Arkansas, Colorado, Georgia, Hawaii, Idaho, Kansas, Maine, Massachusetts, Minnesota, North Dakota, Oklahoma, Oregon, Utah, and Wyoming. *Id.*

The "51% bar" form of modified comparative negligence allows recovery as long as the plaintiff's contributory negligence does not exceed defendants'. This form is followed in Connecticut, Montana, Nevada, New Hampshire, New Jersey, Texas, Vermont, and Wisconsin. *Id.*

Other variations of modified comparative negligence are the "equal division" rule whereby the parties divide damages equally, regardless of relative blame, and the "slight-gross" rule by which the plaintiff may recover only if his negligence is "slight" compared to defendants' "gross" negligence. See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 31 (1974); Campbell, *Theory and Growth of Comparative Negligence*, in *COMPARATIVE NEGLIGENCE* 3, 6 (H. Sorenson ed. 1968).

4. The common law rule of contributory negligence operated to defeat any recovery by the plaintiff if the defendant, regardless of his own negligence, could show that the plaintiff's

recovery of damages by the negligent plaintiff. The all-or-nothing rule of contributory negligence has been consistently criticized as being inequitable in its operation because it fails to distribute responsibility in proportion to fault.⁵

Texas joined the trend of states adopting comparative negligence systems when the Sixty-third Legislature approved enactment of article 2212a, a modified version of the doctrine.⁶ The Texas scheme was modeled after Wisconsin and New Hampshire statutes⁷ which enable a contributorily negligent plaintiff to receive damages unless his fault is greater than that of the defendant. When the plaintiff's negligence is greater than the defendant's, recovery is barred. Thus, the plan does not completely abandon the underpinnings of the contributory negligence doctrine,⁸ but does increase the possibilities of a negligent plaintiff recovering.⁹

Article 2212a, section 1 establishes the standards to be used in determining whether the plaintiff will be allowed to recover, and if so, the amount of damages he will receive:

Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.¹⁰

act contributed in some way to the accident. In tracing the doctrine back to its origin in *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809), Dean Leon Green characterized contributory negligence as "the harshest doctrine known to the common law of the nineteenth century." Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944). See also Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946-47).

Under the doctrine of comparative negligence the defendant must show that the plaintiff's negligence was a proximate, not remote, cause of the injury. *Howard v. Bachman*, 524 S.W.2d 414 (Tex. Civ. App.—Eastland 1975, no writ); see, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 67 (4th ed. 1971); Comment, *Comparative Negligence: Some New Problems for the Maine Courts*, 18 U. ME. L. REV. 65, 92-93 (1966).

5. *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). For an expression of dissatisfaction with contributory negligence, see Turk, *Comparative Negligence on the March* (pts. 1-2), 28 CHI.-KENT L. REV. 189, 304 (1950).

6. The impetus for change from the contributory negligence doctrine began in 1969 with the appointment of a Substantive Law Changes and Advancements Committee by the State Bar Association of Texas. Modified comparative negligence, as part of a general tort reform package, was approved by the Texas House of Representatives and Senate, only to be vetoed by Texas Governor Preston Smith. In 1972 the board of directors of the State Bar of Texas adopted a more comprehensive tort reform package which was subsequently enacted into law. See generally Abraham & Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411 (1973).

7. N.H. REV. STAT. ANN. § 507.7A (Supp. 1975); WIS. STAT. ANN. § 895.045 (Supp. 1977-78). The Wisconsin statute has served to guide other state legislatures in fashioning comparative negligence statutes. See, e.g., Timby, *Comparative Negligence*, 48 PA. B.A.Q. 219, 221 (1977).

8. Before adoption, spokesmen conceded the arbitrariness of a modified comparative negligence form as compared to a pure form in which no one receives any measure of immunity from liability. Nonetheless, the form was considered a great improvement over existing negligence law which allowed a defense of contributory negligence for a relatively insignificant act by the plaintiff. Abraham, *Proposed Texas Modified Comparative Negligence Statute: Its Operation and Effect*, 35 TEX. B.J. 1114 (1972). See also Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 494 (1953) (stating his opinion that the only justification for adoption of the modified rule was "pure political compromise").

9. If jury findings are 50% as the plaintiff's negligence and 50% as the defendant's, plaintiff recovers half of his proved damages. If findings are that plaintiff is 51% negligent and defendant 49% negligent, plaintiff recovers nothing.

10. Art. 2212a, § 1. The draftsmen's language suggests that art. 2212a may be limited to

Therefore, when determining the initial issue of plaintiff's ability to recover in multiple party situations, a court must weigh his proportionate degree of negligence against the aggregate negligence of those against whom recovery is sought.¹¹ This provision liberalizes the Wisconsin and New Hampshire rules which measure the plaintiff's negligence against that of each individual defendant.¹² Treating multiple defendants as a group¹³ rather than as individuals when comparing plaintiff's negligence permits recovery in situations where the Wisconsin and New Hampshire statutes create a bar. For instance, when plaintiff is found to be 45% negligent, defendant *A* to be 30%, and defendant *B* to be 25% negligent, plaintiff would recover 55% of his damages in Texas¹⁴ but would collect nothing under the Wisconsin and New Hampshire laws.¹⁵ In each jurisdiction, however, the total amount of damages proved by the plaintiff must be reduced in proportion to the amount of negligence attributed to him by the jury.¹⁶

II. MULTIPLE PARTIES UNDER ARTICLE 2212a

Problems presented in multiple defendant litigation under the comparative negligence rule are especially troublesome because of the difficulty in equitably segregating the rights and responsibilities of all parties to an action. Jurisdictions using the system have found that perplexing issues of damages and liability allocations are common.¹⁷ Unfortunately, Texas' article 2212a

apportioning damages between joint tortfeasors only when liability is affixed solely on negligence theories. In *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977), the Texas Supreme Court distinguished comparative negligence, or fault, situations from those in which the jury must compare causation of product defect and consumer misuse. *Id.* at 352. In a later opinion the court again refused to apply art. 2212a in a case involving defendants found liable on theories of negligence and strict liability. Because art. 2212a lacked any mechanism for applying damages in such a case, the court applied the general tort contribution statute, TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971), to divide damages between the two sets of defendants. *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977). The two decisions are discussed in Keeton, *Torts, Annual Survey of Texas Law*, 32 Sw. L.J., 1, 10-14 (1978), in which the author argues that the comparative negligence statute should be applied in only those cases involving negligence of defendants and plaintiff. A like interpretation of the Kansas comparative negligence statute is suggested in Kelly, *Comparative Negligence—Kansas*, 43 J. KAN. B.A. 151, 191-92 (1974).

Similar language in the Pennsylvania comparative negligence statute has been viewed to foreclose its application to claims on a liability theory other than common law negligence. *Timby*, *supra* note 7, at 222-23, 225. *But see* *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972), in which the New Hampshire comparative negligence statute was applied in a strict tort liability action.

11. Art. 2212a, § 1; *accord*, CONN. GEN. STAT. § 52-572h (1977); NEV. REV. STAT. § 41.141 (1977). Arkansas courts are in agreement with this rule. *See* *Walton v. Tull*, 234 Ark. 882, 356 S.W.2d 20 (1962).

12. N.H. REV. STAT. ANN. § 507:7-a (Supp. 1975); WIS. STAT. ANN. § 895.045 (Supp. 1977-78). One commentator praised the modification and noted: "With cross actions for damages for multiple defendants, the confusion, inequity and complication in calculating recovery is staggering under the Wisconsin and New Hampshire law." Abraham, *supra* note 8, at 1114.

13. Section 1 determines the plaintiff's right and amount of recovery; the language is consistent with that of the § 2 contribution provision that applies in cases where "the claimant's negligence does not exceed the total negligence of all defendants." Art. 2212a, § 2(b).

14. Recovery is allowed in Texas because plaintiff's 45% negligence is not greater than defendants' total of 55% negligence (the sum of defendant *A*'s 30% negligence and defendant *B*'s 25% negligence).

15. Recovery is not allowed against defendant *A* because the plaintiff's 45% negligence is greater than *A*'s 30%; similarly, plaintiff's negligence is greater than defendant *B*'s 25% negligence and, therefore, recovery is barred against both defendants.

16. Art. 2212a, § 1. *See generally* Annot., 32 A.L.R.3d 463, 474 (1970).

17. *See generally* C.R. HEFT & C.J. HEFT, *supra* note 3.

has not eliminated these problems; indeed, the statute's joinder and settlement provisions add to the complexity of multi-party negligence situations.

A. Joinder of Defendants

Before enactment of article 2212a, Texas law operated to hold all tortfeasors jointly and severally liable and to allow the plaintiff the election of proceeding against one or all for satisfaction of his judgment.¹⁸ A named defendant could implead into the primary suit other tortfeasors who might be liable¹⁹ or proceed against them in a separate contribution suit.²⁰

To implement the revised rule of liability and recovery in multiple defendant cases, the legislature enacted a new contribution statute.²¹ Under Texas' form of comparative negligence, as under the Wisconsin system, all tortfeasors may be joined in one action to adjudicate the rights of each.²² Defendants remain jointly and severally liable for the judgment,²³ but the law has changed in situations where the degree of negligence attributed to any individual defendant is less than that of the plaintiff. Section 2(c) now limits the liability of such a defendant to his percentage of negligence.²⁴ To illustrate, assume that the plaintiff is found to be 25% negligent, defendant A to be 30% negligent, defendant B to be 25% negligent, and defendant C to be 20% negligent. Defendants A and B are jointly and severally liable for the entire award, but defendant C is liable only for his 20% share of negligence.

18. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971) provides:

Contribution between tort feorsors

Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery, over, by and between the defendants is given by statute or exists under the common law, shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment. If any of said persons co-defendant be insolvent, then recovery may be had in proportion as such defendant or defendants are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency.

19. TEX. R. CIV. P. 38; *see* Union Bus Lines v. Byrd, 142 Tex. 257, 177 S.W.2d 774 (1944). *See generally* Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 167 (1947).

20. Hodges, *supra* note 19, at 168. Contribution suits were available to tortfeasors both before and after actual payment of damages. *See generally* 13 TEX. JUR. 2d *Contribution* § 17 (1960).

21. Art. 2212a, § 2. Joinder rules in most comparative negligence jurisdictions have not been affected by the adoption of the doctrine. V. SCHWARTZ, *supra* note 3, at 251. Nevertheless, the new Texas contribution statute was meant to prevail over old art. 2212, as well as over any conflicting laws. Art. 2212a, § 2(h).

22. TEX. R. CIV. P. 40. *See generally* 1 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 3.18 (rev. ed. 1965).

23. Art. 2212a, § 2(c) provides:

Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

24. *Id.* The Texas form represents a compromise between total abolition of joint liability, as adopted in New Hampshire and Vermont, and total preservation of joint and several liability. *See* V. SCHWARTZ, *supra* note 3, at 80-81. The Texas scheme for loss distribution has been praised as ameliorating problems of the uncompensated plaintiff and of the defendant who pays more than his share to a claimant whose negligence is greater. Note, *Multiple Party Litigation Under Comparative Negligence in Kansas—Damage Apportionment as a Replacement for Joint and Several Liability*, 16 WASHBURN L.J. 672, 682 (1977).

The new rule has made the negligent plaintiff's choice of defendants a critical factor toward success of obtaining recovery. Generally, he would wish to join as many parties defendant as possible in the hope of lessening his own percentage of fault as the jury apportions negligence among numerous parties. The change embodied in section 2(c), however, also requires the plaintiff to consider whether a potential defendant might be judgment-proof because the joinder of such a defendant will endanger the plaintiff's chances for full recovery. To illustrate the problem, assume that the plaintiff sues defendants *A* and *B*. At trial the jury sets the plaintiff's negligence at 35%, defendant *A*'s negligence at 35%, and defendant *B*'s negligence at 30%, and finds damages to total \$10,000. Satisfaction of plaintiff's \$6,500 judgment²⁵ is precluded, however, should defendant *A*, who is severally liable for the entire amount,²⁶ be insolvent. Recovery in that event is limited to \$3,000, which represents the amount attributable to defendant *B*'s negligence. Had defendant *A* not been joined, however, it is possible that the jury would have increased defendant *B*'s percentage of negligence to an amount greater than that of the plaintiff, in which case the plaintiff would recover the full \$6,500.²⁷ Although under prior law a negligent defendant *B* would be liable for the entire amount without reference to his proportion of fault,²⁸ section 2(c) changes that rule to protect a solvent defendant who is less negligent than the plaintiff from paying for both his negligence and the negligence of other defendants. As a result, section 2(c) poses additional strategy problems for a plaintiff faced with a judgment-proof defendant who is greatly at fault and a deep-pocket defendant who bears a relatively minor responsibility for the accident in question.²⁹

B. Contribution Among Defendants

In connection with section 2(c)³⁰ the legislature provided in section 2(b)³¹ that contribution³² among negligent defendants be in proportion to the per-

25. Total damages of \$10,000 less \$3,500 representing the plaintiff's own percentage share of negligence.

26. Art. 2212a, § 2(c); see note 23 *supra* and accompanying text.

27. Adams, *Special Consideration for the Negligent Plaintiff Under Comparative Negligence: Joinder of Defendants and the Feasibility of 100% Recovery*, TRIAL LAW. F., July-Sept. 1976, at 7.

28. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).

29. See Adams, *supra* note 27, at 7. For hypothetical recovery situations, see Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655 (1973) [hereinafter cited as Fisher].

30. See note 23 *supra* and accompanying text.

31. "In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant." Art. 2212a, § 2(b). Wisconsin judicially adopted this same formula in *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105, 107 (1962). For a discussion and examples of the negligence and contribution provisions, see Fisher, *supra* note 29. See also Recommendations of the American Bar Association's Special Committee on Automobile Accident Reparations, reprinted in C.R. HEFT & C.J. HEFT, *supra* note 3, app. II.

32. Contribution distributes the loss among tortfeasors by requiring each to pay his proportionate share. In contrast, indemnity shifts the entire loss from one tortfeasor who has been compelled to pay to another who should bear it instead. See generally C.R. HEFT & C.J. HEFT, *supra* note 3; W. PROSSER, *supra* note 4, § 51; Greenstone, *Spreading the Loss—Indemnity, Contribution, Comparative Negligence & Subrogation*, 13 FORUM 266 (1977).

The Pennsylvania Supreme Court rejected the argument that indemnity is a form of compara-

centage share of negligence attributable to each. The language of section 2(b) thus provides for the application of pure comparative negligence in questions of contribution among tortfeasors³³ because any defendant who has paid more than his percentage share is entitled to recover a contribution from the other defendants until each defendant has paid an amount corresponding to his respective percentage share of fault. For example, assume defendant *A* has paid \$9,000 to satisfy the plaintiff's judgment when damages totaled \$10,000 and negligence findings were plaintiff at 10%, defendant *A* at 40%, defendant *B* at 35%, and defendant *C* at 15%. Defendant *A* may receive \$3,500 from defendant *B* and \$1,500 from defendant *C* as contribution.

C. Required Contribution Claims

The Texas draftsmen were concerned with both the possibility of multiple lawsuits in multiple defendant cases and potential inequities in distributions of responsibilities.³⁴ In an effort to avoid such problems, section 2(g)³⁵ requires that "[a]ll claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant."³⁶ The legislature designed this section not only to avoid a multiplicity of suits and to ease administration of caseloads, but also to allow full apportionment among all negligent defendants.³⁷ It was stressed that a defendant "may not, after the primary suit has been concluded, institute suit for an initial claim, or contribution against anyone whomsoever,"³⁸ with the sole exception of suit being available against one who had never been made a party and who had not effected settlement.

Venue for Contribution Claims. Two courts of civil appeals have viewed section 2(g) as a special venue provision and ruled that venue for cross-actions is proper in the county where the court hearing the primary suit resides.³⁹ These holdings may seem contradictory to the general rule of *Union Bus Lines v. Byrd*⁴⁰ that a third-party action pursuant to Texas Rule of Civil Procedure 38 must be viewed independently from the primary

tive negligence in *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368 (1951), reasoning that contribution involved different degrees of negligence, whereas indemnity concerned different kinds of conduct. *Id.* at 325-26, 77 A.2d at 370.

33. The provision is compared to those of other states in *V. SCHWARTZ, supra* note 3, at 263.

34. Abraham, *supra* note 8, at 1115.

35. Art. 2212a, § 2(g).

36. *Id.*

37. Comment, *Comparative Negligence in Texas*, 11 HOUS. L. REV. 101, 113 (1973).

38. Abraham & Riddle, *supra* note 6, at 420.

39. *LaSorsa v. Burr*, 516 S.W.2d 265 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (art. 2212a, § 2(g) allows a named defendant to maintain cross-action against nonresident named defendant); *Goodyear Tire & Rubber Co. v. Edwards*, 512 S.W.2d 748 (Tex. Civ. App.—Tyler 1974, no writ) (where a named defendant files a cross-claim against another named defendant for contribution, the mandatory language of art. 2212a, § 2(g) provides that venue be in the county where the court hearing the primary suit is situated).

40. 142 Tex. 257, 261, 177 S.W.2d 774, 776 (1944).

action, and consequently venue must be separately pled and proven.⁴¹ Both courts of civil appeals cases, however, involved cross-actions against persons who were also named as defendants by the plaintiff in the primary action⁴² and may be explained by the well-established exception for a third-party defendant who, at the time of the venue hearing, is also a defendant named by the original plaintiff. In such cases the court will consider venue to be the same as that of the primary suit. No court, however, has yet determined whether the *Union Bus Lines* rule has been changed by the comparative negligence statute in a case in which the third-party defendant has not been named by the plaintiff as a defendant in the primary action. For example, assume a plaintiff sues defendant *A*, who impleads *B* under rule 38, but the plaintiff never joins *B* as a named defendant. Although venue is present as to defendant *A*, third-party defendant *B* asserts a plea of privilege.⁴³ It is unclear whether defendant *A* can defeat *B*'s claim by virtue of section 2(g)'s authority. Defendant *A* can argue that the section applies to *B* in this situation because the contribution provision describes a defendant as "any party from whom a claimant seeks relief."⁴⁴ Additionally, the provision defines a claimant as "any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant."⁴⁵ According to its definition, therefore, the term "defendant" would include one present in the suit only as a third-party defendant.

Notwithstanding the contribution definitions, however, section 2(g) governs only "named defendants in the primary suit." The phrase arguably envisions only those defendants named by the plaintiff; thus, under the example, venue as to *B* must be independently shown. Accordingly, the provision awaits judicial interpretation with respect to its scope as a special venue statute extending to a third-party defendant who has not been named as a defendant by the plaintiff but who is nevertheless a defendant within the meaning of the contribution statute.⁴⁶

The Effect of Subsequent Suits. The effect of the language of section 2(g) seems inconsistent with the expressed wish of the drafters to resolve as fairly as possible apportionments of the negligence of all involved in the injury. A later, separate suit against an alleged tortfeasor not named in the

41. See R. McDONALD, *supra* note 22, §§ 4.03.1, 4.55. Subsection (d) of rule 38 states that impleader may not be applied so as to violate any venue statute. TEX. R. CIV. P. 38(d).

42. 516 S.W.2d at 266 (plaintiffs amended petition to add as a defendant the third-party defendant impleaded into the action); 512 S.W.2d at 749 (third-party defendant originally named as a defendant in the primary suit).

43. The general venue statute provides to a Texas resident the right to be sued in the county of his residence unless the action falls within a venue exception. TEX. REV. CIV. STAT. ANN. art. 1995 (Vernon 1964). See generally 3 W. DORSANEO, TEXAS LITIGATION GUIDE §§ 61.01-.03 (1978).

44. Art. 2212a, § 2(a)(2).

45. *Id.* § 2(a)(1).

46. Texas commentators differ over the state's venue authority. In 3 W. DORSANEO, *supra* note 43, § 61.05 the author maintains the *Union Bus Lines* rule applies in such a situation because § 2(g) "recognizes the separate nature of such an action by its authorization for a named defendant to proceed in a subsequent suit for contribution against a cotortfeasor who was not a party to the former suit and who has not settled with the claimant." See also *id.* §§ 80.01[2], .03[4]. But see G. HODGES, A. JONES, & F. ELLIOTT, THE JUDICIAL PROCESS PRIOR TO TRIAL IN TEXAS 395 (2d ed. 1977), concluding without discussion that the comparative negligence provision reverses the holding of *Union Bus Lines*.

primary suit who did not settle with the claimant⁴⁷ could conceivably alter primary allocations of negligence. For example, assume an initial suit with findings of 30% negligence on the part of the plaintiff, 35% on defendant *A*'s part, and 35% on defendant *B*'s part. Each defendant is jointly and severally liable for the total amount of both defendants' negligence,⁴⁸ and, having satisfied the judgment, defendants *A* and *B* proceed against *C*, who was not an original party and did not settle with the plaintiff. While courts have not yet had occasion to analyze the effect of a subsequent finding of *C*'s negligence, it seems clear that *C* is not bound by the findings in the primary suit on the issues of negligence and damages.⁴⁹

One approach to the problem of separate suit apportionments would permit the defendant named in the primary suit to receive contribution only if the subsequent suit determined the plaintiff was legally entitled to recover against the contribution defendant. In such a case the amount of contribution would be that portion of the claimant's damages which represents the percentage of the negligence attributable to the contribution defendant, and that claimant's damages would be the amount fixed by the jury in the contribution suit, not to exceed the amount recovered in the primary suit.⁵⁰ Such a result would preserve the apportionments originally made as to the named defendants in the primary suit, yet allow for recalculation of negligence in the subsequent suit to enable the contribution claimant a measure of recovery.

Potential prejudice to original defendants nonetheless remains when *C* is never joined in the primary suit. Had *C* been joined under the preceding hypothetical, it is clearly possible that the portion of negligence ascribed to defendants *A* and *B* might have been lowered to the point of limited liability, a point less than that of the plaintiff's negligence.⁵¹ This finding would become especially important if one of the defendants is judgment-proof.

To avoid the possibility of prejudice to their interests, the named defendants should join all potential defendants to the primary action.⁵² Consequently, when a claimant sues only one of two allegedly negligent tortfeasors, the named defendant should implead the other under Texas Rule of Civil Procedure 38 if he can show that the third-party defendant is or may be liable to him or to the plaintiff in the action. Such a strategy seems desirable on the part of the first-named defendant in order to shift part of the liability to another negligent tortfeasor.

47. The language permitting "named defendants" to sue separately for contribution arguably extends to a third-party defendant who was not joined by the plaintiff. See text accompanying notes 39-46 *supra*.

48. See note 23 *supra* and accompanying text.

49. Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 11 (1974). For a discussion of res judicata and its application in Texas, see Steakley & Howell, *Res Judicata*, 28 Sw. L.J. 355 (1974).

50. Keeton, *supra* note 49, at 11-12.

51. See note 24 *supra* and accompanying text.

52. Texas venue requirements may continue to pose an obstacle to impleader for contribution. See notes 39-46 *supra* and accompanying text.

Joinder of Settling Tortfeasors. Despite the policies of article 2212a, section 2(g) presents a problem with regard to joinder of nonparty tortfeasors who have settled with the plaintiff and over whom venue, viewed independently from the primary suit, is not available.⁵³ The section's language requiring primary suit contribution actions between *named* defendants, coupled with the exception clause which limits permissible separate suits only to those between named defendants and nonsettling tortfeasors, may arguably exclude joinder by named defendants of those settling tortfeasors not named as parties before settlement who can successfully assert a venue exception.⁵⁴ An inability to join a settling tortfeasor as a party is particularly significant because section 2(d) appears to foreclose jury consideration of the amount of negligence attributable to him.⁵⁵ Thus, if plaintiff settled with dismissed defendant *A* before defendant *B* brought a cross-claim against him, defendant *B* may have no procedural mechanism to effect defendant *A*'s rejoinder in the event of venue problems.

Notwithstanding this deficiency, it appears that the draftsmen assumed that present defendants could treat settling tortfeasors as "named defendants" within the meaning of section 2(g) for venue purposes. A 1973 article suggested that a defendant who was unhappy with a situation where the settling tortfeasor was not a party to the suit "should immediately cross-claim against such settling party and bring him into the suit."⁵⁶ Similarly, another article,⁵⁷ co-authored by a member of the Sixty-third Legislature,⁵⁸ indicated that joinder of a settlor by a named defendant was not believed to pose a problem under the new statute at the time it was enacted.⁵⁹

The language of section 2(g) may be further criticized for its failure to denote when defendants must be named. Section 2(e) supplies a measurement for a settling tortfeasor "joined as a party defendant at the time of the submission of the case to the jury."⁶⁰ Presumably, this same time standard would apply equally to joinder of additional, nonsettling defendants.

Joinder as "Insistible" Parties. It has been suggested as one solution to the joinder problem that all parties in comparative negligence actions who allegedly caused the injury complained of be treated as "insistible" par-

53. See *Union Bus Lines v. Byrd*, 142 Tex. 257, 177 S.W.2d 774 (1944), which requires that venue of third-party defendants must be established independently of venue established in the main suit.

54. See discussion *supra* at notes 39-46 and accompanying text.

55. "If an alleged joint tortfeasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (*for which reason the existence and amount of his negligence are not submitted to the jury*)" Art. 2212a, § 2(d) (emphasis added). The language portends interpretative battles because arguably it does not expressly *prohibit* submission to the jury.

56. Abraham & Riddle, *supra* note 6, at 418. It should be noted that the article implies that the settling tortfeasor had been joined at one time, and it did not mention cases in which the plaintiff had never joined the settling defendant.

57. Fisher, *supra* note 29.

58. James Nugent, Texas House of Representatives, 63rd Legislature.

59. Fisher, *supra* note 29, at 662. In discussing strategies for parties under comparative negligence, the article offhandedly treats the issue of joinder: "when the settling defendant is actually made a party to the suit, by way of cross-action or otherwise."

60. Art. 2212a, § 2(e).

ties.⁶¹ The insistible party concept, fully discussed in the landmark case of *Petroleum Anchor Equipment, Inc. v. Tyra*,⁶² refers to those persons " 'who should be made, and, if another party in the suit insists upon it, must be made [parties] . . . unless jurisdiction cannot be gotten over them, in which event, this procedure is excused.' " ⁶³ The concept was interpreted to mean those parties who *ought* to be joined if complete relief is to be accorded among those parties already named.⁶⁴

When considering the issue of necessary joinder, courts refer to the guidelines of Texas Rule of Civil Procedure 39,⁶⁵ which speaks of joinder of persons needed for just adjudication. Since any subsequent contribution action allowed under present section 2(g) could disrupt liabilities established in the primary suit, arguably named defendants in a suit subject to article 2212a are denied fair treatment where joinder of all participants would have lowered their respective percentage of liability. Initially, the statement appears disproved by the rule of pure joint and several liability because a reduction of defendants' percentage shares under total joinder conditions would still render them liable for the entire judgment. Hence, in *Ross v. Koberstein*,⁶⁶ the Wisconsin Supreme Court affirmed, although holding improper, a trial court's instructions for jury comparison of plaintiff's negligence with an in-court defendant only. The instruction was allowed to stand in that case because the named defendant had not been prejudiced under the Wisconsin law which held him jointly and severally liable.

Wisconsin's rule of pure joint and several liability may be distinguished from the hybrid embodied in article 2212a. As noted earlier, Texas excepts from its general rule of joint and several liability those defendants whose negligence apportionments are less than the plaintiff's.⁶⁷ Therefore, under the Texas comparative negligence law, a reduction of a named defendant's percentage share to the point of limited liability resulting from joinder of all tortfeasors will significantly lessen his financial liability. Further, a consideration of inconsistent obligations from multiple suits as required under rule 39(a)(2)(ii)⁶⁸ suggests that named defendants who are affected by subsequent suits must experience a reshifting of liabilities.

Rule 39 appears to be applicable as well to the absent, nonsettling tortfeasor whose negligence is considered separately in a subsequent suit. Any separate suit for contribution could result in attributing to such a party a

61. Keeton, *supra* note 49, at 11.

62. 406 S.W.2d 891 (Tex. 1966).

63. *Id.* at 893.

64. *Id.* See generally R. McDONALD, *supra* note 22, § 3.23, at 33-36 (Supp. 1977).

65. TEX. R. CIV. P. 39(a). The rule demands joinder of a person who is subject to service of process if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

66. 220 Wis. 73, 264 N.W. 642 (1936).

67. See note 24 *supra* and accompanying text.

68. See note 65 *supra* and accompanying text.

percentage share of negligence greater than that which would have been found if considered with all tortfeasors in the primary suit.⁶⁹

Any attempt to compare percentage shares of total joinder situations with those made in separate suits is admittedly suspect. In addition, jury findings made in total joinder cases represent only an approximation of fault relationships. It is clear, however, that failure to consider negligence of all tortfeasors in a single suit will almost certainly result in incorrect and often inequitable allocations under comparative negligence.⁷⁰ Because the non-joinder of a potential party affects and may prejudice the rights of all other parties in any lawsuit, the presence of all possible parties is essential for a fair resolution of claims in a comparative negligence action.

III. SETTLEMENT CREDITS FOR NONSETTLING DEFENDANTS

Courts have typically experienced difficulties in dealing with releases in multiple party actions under comparative negligence systems.⁷¹ Texas follows the rule announced in *McMillen v. Klingensmith*⁷² that an injured party releases only the party or parties named in the document.⁷³ The practice of multiple joinder in the negligence context leads generally toward settlements because the settling tortfeasor is able to fix the limits of his liability. Consequently, through settlement one tortfeasor may avoid the possibility of having to pay the whole judgment under joint and several liability, as well as avoid the situation in which defendants, in effect, prove the plaintiff's case by making accusations against each other.⁷⁴ Settlements between the claimant and an alleged tortfeasor also have an effect on the remaining nonsettling tortfeasors' liabilities, however, and the draftsmen of article 2212a stated procedures for crediting settlement amounts in sections 2(d) and 2(e).

69. Keeton, *supra* note 49.

70. See note 47 *supra* and accompanying text.

71. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 36 (1953).

72. 467 S.W.2d 193 (Tex. 1971).

73. *Id.* at 196. The rule simplifies earlier Texas law that a document of settlement might be construed as a release with satisfaction, or a covenant not to sue which retained a cause of action against other tortfeasors. The rule poses difficulties in a situation where indemnity would be proper because the status of the parties cannot be ascertained unless all are present in the action. See note 32 *supra*. See generally 4 W. DORSANEO, *supra* note 43, § 102.04 (1977).

74. The subject of preservation of rights by the settling tortfeasor is discussed in C.R. HEFT & C.J. HEFT, *supra* note 3, §§ 4.210-.230. Art. 2212a, § 2(e) appears to suggest that the settling tortfeasor, if a named defendant, may proceed for contribution rights if the amount paid by him in settlement was larger than one equivalent to the percentage of his negligence found by the jury. The applicable language of that section reads, "the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tortfeasor."

If the language is construed to mean that none may proceed against him, the tortfeasor may still be able to preserve a cause of action in the event his settlement represented an overlarge burden in a system whose basis requires that contribution be made according to degree of negligence. The draftsmen of the statute, however, may have intended the statutory language to preclude reservation of contribution rights by the settling tortfeasor, even though in some instances this interpretation would mean that the plaintiff would receive a windfall. For example, assume defendant A settles with the plaintiff for \$4,000 and his negligence is apportioned by the jury at 30%, defendant B is held to be 45% negligent, and the plaintiff to be 25% negligent. The award of \$7,500 (based on proved damages of \$10,000, diminished by the plaintiff's percentage share of negligence (\$2,500)) would be less than the plaintiff actually received because defendant B's percentage share (\$4,500) in addition to the settlement figure (\$4,000, equal to a "complete release" of defendant A's 30% share of negligence) equal \$8,500.

A. *Section 2(d): Nonjoinder of Settlor*

When settlement is made with an alleged tortfeasor who is not a named defendant at the time of jury consideration, "for which reason the existence and amount of his negligence are not submitted to the jury,"⁷⁵ section 2(d) allows named defendants to deduct from the amount for which each is liable a percentage of the settlement "based on the relationship the defendant's own negligence bears to the total negligence of all defendants."⁷⁶ To illustrate the section 2(d) formula, assume the plaintiff's damages are found to be \$10,000 with apportionments of negligence made as follows: plaintiff is 20% negligent, defendant A is 40% negligent, and defendant B is 40% negligent. No finding is made for C, who settled and was not made a party to the suit. In such a situation the plaintiff's award is \$8,000.⁷⁷ The named defendants would then receive a credit for the sum paid in settlement. Had the settlement figure been \$5,000, for example, each defendant would owe \$1,500, representing his proportionate share of the judgment figure ((one-half of \$8,000, or \$4,000) less a credit of his percentage of negligence individually to the total negligence of both defendants (40/80 multiplied by the settlement figure of \$5,000, or \$2,500)). In effect, each defendant receives a credit for money paid to the plaintiff by one whose degree of or absence of negligence was not affixed by the jury.⁷⁸

Section 2(d) was enacted to revise the common law rule announced in *Palestine Contractors, Inc. v. Perkins*⁷⁹ which acted to release the portion of the plaintiff's claim attributable to the amount of negligence on the part of the settlor. The claimant's recovery was based on the number of defendants, using a per capita or equal amounts rule.⁸⁰ Under section 2(d), however, each negligent defendant reduces the amount of his exposure by a percentage of the settlement, determined by dividing the defendant's negligence by the negligence of all defendants.

The difference between the *Palestine Contractors* rule and the rule of section 2(d) is best shown by example. Assume the plaintiff released A, a joint tortfeasor, in consideration of a \$1,000 payment and proceeded to trial against defendant B, where his damages were proved to be \$10,000. Applying the equal amounts rule of *Palestine Contractors*, defendant B would be liable only for half the judgment as the remaining tortfeasor. Plaintiff's total recovery would therefore be \$6,000 (50% of \$10,000, plus the \$1,000 settle-

75. Art. 2212a, § 2(d).

76. *Id.*

77. Total damages less (damages multiplied by the percentage of the plaintiff's negligence).

78. An interesting possible construction of the provision is offered by Fisher, *supra* note 29, at 663 n.22. (quoting art. 2212a, § 2(d)). Fisher hypothesizes that if an alleged tortfeasor pays an amount to a claimant in settlement, the amount of settlement, if not paid at time of judgment, may not be credited to the judgment against a nonsettling defendant. *Id.*

79. 386 S.W.2d 764 (Tex. 1964) (in an action for personal injuries received from an automobile accident, a covenant not to sue given to the settling tortfeasor precluded plaintiff from recovering more than half of the damages from the remaining nonsettling tortfeasor).

80. *Id.* For a discussion of the case, see Note, *Settlement with One Joint Tortfeasor Bars Recovery Against Others of the Settling Tortfeasor's Proportionate Share of Damages*, 19 Sw. L.J. 650 (1965). The note points out the practical advantages of the rule announced in the case; under *Palestine Contractors* only the fact of negligence, rather than degree of negligence, was determined. Section 2(d), however, applies to both parties of apportioned negligence and to other nonparty participants, about whom no determination will be made.

ment). By settling with *A* the plaintiff had effectively released one half of his claim. Under section 2(d), however, the plaintiff would recover the full \$10,000 because defendant *B* is fully responsible for the judgment and receives only a monetary credit for the settlement amount.⁸¹

B. Section 2(e): Joinder of Settlor

Where settlement is made with an alleged tortfeasor who is a named defendant in the case when submitted to the jury "so that the existence and amount of his negligence are submitted to the jury,"⁸² section 2(e) credits nonsettling defendants with the proportion of negligence which was attributed to the settling defendant.⁸³ This formula would be utilized in a case where plaintiff's damages are found to be \$10,000, plaintiff's negligence to be 10%, defendant *A*'s 30%, defendant *B*'s 25%, and settling defendant *C*'s 35%. If defendant *C* settles for \$2,000, the percentage of his fault, not the amount of his settlement, is credited to the nonsettling defendants. Defendants *A* and *B* are jointly and severally liable for \$5,500,⁸⁴ an amount representing their combined percentages of negligence.

The prospect of the differing formulas for crediting nonsettling defendants is an argument for joinder in those situations where the plaintiff may have made an inadequate settlement; named defendants who believe that a settling defendant making a small settlement is significantly negligent would clearly wish to join the settlor in order to lower the original defendants' negligence⁸⁵ and also trigger the more advantageous section 2(e) formula.⁸⁶

81. The § 2(d) formula takes the amount of the judgment owed by defendant *B* and subtracts the amount plaintiff received in settlement (\$1,000) to arrive at a final amount of \$9,000 owed by defendant *B*.

82. Art. 2212a, § 2(e).

83. Should the plaintiff receive a settlement figure representing more than the settling defendant's percentage share, the plaintiff's recovery is probably still limited to the amount of his actual damages on the theory that a plaintiff is entitled to but one satisfaction of his damages. But no case law since the enactment of art. 2212a has reaffirmed the principle of *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971), which held that a claimant who has released a party will not be allowed to recover more than the amount representing satisfaction of his damages. See also *Hodges*, *supra* note 19, at 170-72.

84. The \$10,000 of proved damages are diminished by plaintiff's percentage share (\$10,000 less (10% of \$10,000) equals \$9,000) and by the percentage share of *C* (\$9,000 less (35% of \$10,000)) to yield a result of \$5,500. Because the individual percentage shares of *A* and *B* are each larger than that of the plaintiff, each defendant is liable for the whole, with a right of contribution against the other nonsettlor. For example, if defendant *A* pays the award, he is entitled to receive contribution from defendant *B* of \$2,500.

85. The jury, however, is not bound to distribute 100% of negligence findings in a case, and it is theoretically possible that a jury might allocate equivalent percentages of culpability to nonsettling tortfeasors in cases under both §§ 2(d) and 2(e). 5 W. DORSANEO, *supra* note 43, § 122.121[1] [b] (1977). For example, in a case where the settling tortfeasor remained as a party in the action (triggering the formula under §2(e)), all defendants' acts would receive negligence apportionments by the jury. Had the settling tortfeasor been dismissed or never joined, under § 2(d) the jury could affix the same percentages to the remaining nonsettling defendants by refusing to apportion 100% negligence among the parties.

In situations where settlement is not a consideration, one may consider more significant the probability that joinder of additional parties as defendants would also reduce the plaintiff's percentage of negligence, thus increasing the aggregate amounts of all defendants' fault. Under joint and several liability, therefore, the amount for which each defendant would potentially be liable would increase. See generally *V. SCHWARTZ*, *supra* note 3, at 331-32. For a consideration of joinder tactics relating to contribution rights and insolvent defendants, see *Adams*, *supra* note 27. See also note 21 *supra* and accompanying text.

86. *Keeton*, *supra* note 49, at 11.

Recoveries under sections 2(d) and 2(e) are compared in the following example. Assume a settlement situation where damages appear reasonably estimated at \$10,000. If named defendant *A* believes that a jury considering the acts of settling tortfeasor *B* would find him to be approximately 50% negligent, the plaintiff to be 20% negligent, and defendant *A* 30% negligent, the jury using the section 2(e) formula would hold defendant *A* liable for \$3,000, the amount corresponding to his percentage share of negligence. In contrast, when the jury considers only the relative percentages of the plaintiff and the named nonsettling defendant, under section 2(d) the respective charges of liability of the plaintiff and defendant *A* might be 40% and 60%. Since named defendant *A* is entitled to a credit for the amount paid in settlement, should plaintiff settle with *B* for only \$1,000, defendant *A* would have a liability of \$5,000 (total damages of \$10,000 less the percentage attributable to plaintiff's negligence (40% multiplied by \$10,000) plus the amount of settlement (\$1,000)).⁸⁷ The difference between the recoveries under the two formulas arises because the amount of money due from the nonsettlor to the claimant under section 2(e) is governed by his percentage of fault, while under section 2(d) his liability is determined by the amount of settlement.⁸⁸

C. *Jury Consideration of Settlor's Negligence*

The settlement provisions implicitly suggest that a settlement⁸⁹ made with one who was not a party to the suit at the time of submission to the jury⁹⁰ precludes jury consideration of both the existence and amount of the settlor's negligence.⁹¹ Such a distinction of party or nonparty status can be criticized as inconsistent with the theory of comparative negligence and as incompatible with the prospects for an equitable and final apportionment of fault. Accordingly, Dean Keeton argues that the failure to join should not determine whether an alleged tortfeasor's acts will be submitted to the jury. Rather, he believes the section 2(e) method is the correct formula to use, regardless of whether the settling tortfeasor has been joined.⁹² Thus, the settlement would act as a complete release of the portion of the judgment corresponding to the percentage of negligence found on the part of the settling joint tortfeasor.

This position reflects a practical realization that a settling party who has been joined will neither need nor wish to participate actively in the lawsuit. The need to have all parties before the court in order to do full justice, however, is a compelling consideration. Joinder of the settling tortfeasor as a nominal, passive defendant would allow the jury's apportionment of the existence and extent of the settling tortfeasor's negligence. Furthermore,

87. See note 75 *supra* and accompanying text.

88. See Fisher, *supra* note 29.

89. Referring to *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971), Dean Keeton presumed that the settlement document envisioned by the legislature would release only the person with whom the settlement is made. Keeton, *supra* note 49, at 13-14.

90. See note 60 *supra* and accompanying text.

91. Art. 2212a, §§ 2(d), 2(e); see note 55 *supra* and accompanying text. The temporal measurement appears in art. 2212a, § 2(e).

92. Keeton, *supra* note 49, at 14.

under the applicable settlement formula of section 2(e), the nonsettling defendant is not prejudiced in cases where the plaintiff has made an inadequate settlement, unlike the section 2(d) formula, for his liability is directly related to the amount of his own negligence.

D. *Alternative Basis for Settlement Credits*

The use of the formulas in sections 2(d) and 2(e) depends on whether the settling tortfeasor is made a party to the suit. The effect of this distinction has been properly criticized as misplaced,⁹³ for the procedural fact of a settlor's joinder should not determine issues of whether his negligence is affixed and what credit is to be received by nonsettling defendants. Rather, a better-reasoned distinction between sections 2(d) and 2(e) hinges on whether the settlements were made with one who was legally liable.⁹⁴ Such an analysis was made in a 1971 decision, *Gill v. United States*,⁹⁵ in which the Fifth Circuit Court of Appeals required a specific finding regarding the presence or absence of negligence on the part of one who had settled with the plaintiff. Applying Texas law,⁹⁶ the court held that if the settlor is determined to be negligent, the equal division rule⁹⁷ should apply. Should the settlor be adjudged to have acted without negligence, however, the court decreed that the amount received in settlement was to be applied as a credit to reduce the amount to be recovered against other defendants.⁹⁸

Although decided under the equal division rule, the reasoning expressed in the case appears equally appropriate for a system of comparative negligence. When a settlor was found to be negligent under article 2212a, the *Gill* court's analysis would merely substitute the section 2(e) percentage share credit for the equal division credit used in that case. When the settlor was found by the jury to have been without negligence, however, the sum he paid in settlement would be applied under section 2(d) to credit the other defendants, as was required in *Gill*.

Application under a modified article 2212a may be illustrated in two examples. Assume for each hypothetical that the plaintiff settles with *C*, an alleged tortfeasor, for \$1,000. At trial, plaintiff proves damages of \$10,000 and the jury considers the negligence of all participants to the damaging event. Under the first example, plaintiff is 10% negligent, defendant *A* is 50%, defendant *B* 25%, and nominal defendant *C* is 15% negligent. Utilizing the formula under section 2(e) as applicable when the settlor is found to be negligent, recovery from defendants *A* and *B* is \$7,500⁹⁹ and the settlement

93. *Id.*

94. *Id.*

95. 429 F.2d 1072 (5th Cir. 1970) (extent of amount recoverable against United States where negligent air traffic controller proximately contributed to crash of airplane depends on determination of negligence of pilot, who settled).

96. *Id.* at 1075. The action was brought against the United States under the Federal Tort Claims Act which requires that United States liability is to be determined in accordance with the law of the state where the asserted negligence occurred. 28 U.S.C. § 1346(b) (1970).

97. See note 79 *supra* and accompanying text.

98. 429 F.2d at 1079 (citing *McMullen v. Coleman*, 135 S.W.2d 776, 778 (Tex. Civ. App.—Waco 1940, no writ)).

99. Total damage amount of \$10,000, less plaintiff's percentage share (10% multiplied by \$10,000) less the amount attributed to defendant *C*'s negligence (15% multiplied by \$10,000).

of \$1,000 from nominal defendant *C* acts as a complete release of his 15% negligence.¹⁰⁰ Contrast the second example in which the jury's findings set plaintiff's negligence at 25%, defendant *A*'s at 45%, defendant *B*'s at 30%, and nominal defendant *C* is determined non-negligent. To avoid a windfall recovery by the plaintiff, the amount he received for release of *C* is credited under section 2(d) to the amounts owed by defendants *A* and *B* in an amount proportionate to the percentage share of each. The calculation under section 2(d) for defendant *A* is his percentage share (\$4,500) less a credit proportionate to the negligence of both defendants (45/75 multiplied by \$1,000) of \$600, for a final liability of \$3,900, while defendant *B* receives a credit of \$400 measured by the same method (30/75 multiplied by \$1,000) to apply toward his percentage share of \$3,000. The plaintiff's claims are fully satisfied because he receives his proved damages less his percentage share of negligence (\$10,000 less (25% multiplied by \$10,000)=\$7,500). Thus, by conditioning the formulas on the basis of a presence or lack of legal liability of the settling tortfeasor, named nonsettling defendants would in any event be entitled to have their negligence apportioned in relation to all participants. Such a determination would be consistent with the goal of a comparative negligence system to attain a fair and equitable resolution of proportionate fault.

IV. RESOLUTION OF JOINDER AND SETTLEMENT DEFECTS: GUIDANCE FROM OTHER JURISDICTIONS

A consideration of methods for correcting incomplete joinder and settlement problems under article 2212a is aided by studying efforts of other jurisdictions. Florida, California, and Alaska have judicially adopted an entire system of comparative negligence,¹⁰¹ but their decisions admittedly represent a philosophical departure from most state courts' reluctance to intervene in what they consider to be a matter of legislative competence. Nevertheless, courts in states under statutory systems of comparative negligence have not been totally unwilling to modify and refine their systems. In this way, courts have judicially developed methods of joinder and issue submission in an effort to evaluate the negligence of all tortfeasors in an action.¹⁰²

In *Walton v. Tull*¹⁰³ the Arkansas Supreme Court was required to interpret the Arkansas comparative negligence statute¹⁰⁴ which provided that a plain-

100. An example of a settlement which represents an amount greater than the settlor's percentage share is shown where the plaintiff is 10% negligent, defendant *A* is 50%, defendant *B* 25%, and nominal defendant *C* is 15% negligent. A settlement of \$2,000 represents an amount greater than nominal defendant *C*'s 15% negligence. Defendants *A* and *B* remain unaffected by the amount of settlement. Cases have not presented the issue of the effect of such an over-large settlement. See note 74 *supra*.

101. See note 2 *supra* and accompanying text.

102. See generally V. SCHWARTZ, *supra* note 3.

103. 234 Ark. 882, 356 S.W.2d 20 (1962) (plaintiff with 10% negligence allowed to recover from a defendant whose individual negligence was no greater by comparing the plaintiff's negligence against the aggregate of defendants' negligence).

104. The Arkansas statute read: "[C]ontributory negligence shall not bar recovery of damages for any injury, property damage(s) or death where the negligence of the person injured or killed is of less degree than the negligence of *any person*, firm, or corporation causing such damage." 1961 Ark. Acts, No. 61, § 1 (emphasis added), repealed by 1973 Ark. Acts, No. 303, § 4. For present law see ARK. STAT. ANN. §§ 27-1763 to -1765 (Supp. 1977).

tiff's recovery would not be barred if his negligence was less than that of "any person" causing the damage.¹⁰⁵ Despite the apparent meaning of the statute, the court held that the negligence of multiple tortfeasors should always be considered in the aggregate in applying the fifty percent bar to recovery. The court interpreted the statutory language "any person" to have a plural meaning and based its decision on the belief that such a construction was consistent with the intent of the comparative negligence statute as a whole.¹⁰⁶ While its reasoning may be questionable, the *Walton* decision does exemplify a judicial willingness to look beyond a technical reading of the provision to strengthen the workings of the statute as a whole.

The importance of complete determination of negligence was recognized by the Wisconsin Supreme Court in *Pierringer v. Hoyer*,¹⁰⁷ a case where a settling tortfeasor had been dismissed from the action and counterclaim.

The issue between the plaintiff and the nonsettling defendant . . . is the percentage of causal negligence, if any, of the nonsettling defendant, but such percentage of negligence can only be determined by a proper allocation of all the causal negligence, if any, of all the joint tort-feasors and of the plaintiff if contributory negligence is involved. The determination of this issue between the plaintiff and the nonsettling defendant does not require the settling defendants to remain parties because the allocation, if any, of the causal negligence to the settling tort-feasors is merely a part of the mechanics by which the percentage of causal negligence of the nonsettling tort-feasor is determined. It makes no practical difference to the settling tort-feasors what percentage of causal negligence is allocated to them because they have bought their peace in any event.¹⁰⁸

The *Pierringer* court's decision thus allows nonsettling defendants to bring in the settling party for jury findings¹⁰⁹ and recognizes that a failure to submit the negligence of all would prejudice the nonsettling party.¹¹⁰ Unlike

105. 1961 Ark. Acts, No. 61, § 1.

106. 234 Ark. 882, 356 S.W.2d 20, 26-27 (1962). The holding in *Walton* was reaffirmed in *Riddell v. Little*, 253 Ark. 686, 688, 488 S.W.2d 34, 36 (1972). In 1973 the Arkansas Legislature repealed the comparative negligence statute, replacing it with a rule concerning "fault."

107. 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

108. 124 N.W.2d at 111-12. For a discussion of the case, see Philipp, *Settlements, Releases and Covenants*, in *COMPARATIVE NEGLIGENCE*, *supra* note 3, at 57, 62-65.

109. Philipp, *supra* note 108, at 62-65. The decision has been interpreted as encouraging settlements. See Coates, *Pitfalls for the Plaintiff*, in *COMPARATIVE NEGLIGENCE*, *supra* note 3, at 28.

110. For a fuller judicial development of the principle of total negligence determination, see *Firkus v. Rombalski*, 25 Wis. 2d 352, 130 N.W.2d 835 (1964); *Pagel v. Kees*, 23 Wis. 2d 462, 127 N.W.2d 816 (1964); *Hardware Mutual Cas. Co. v. Harry Crow & Son*, 6 Wis. 2d 396, 94 N.W.2d 577 (1959); *Patterson v. Edgerton Sand & Gravel Co.*, 227 Wis. 11, 277 N.W. 636 (1938); *Ross v. Koberstein*, 220 Wis. 73, 264 N.W. 642 (1936). Wisconsin courts have used the degree of prejudice to named defendants as a criterion for measuring the importance of ascertaining negligence of absent tortfeasors. In *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934), the Wisconsin Supreme Court allowed jury comparison of negligence to include one whose presence in the suit was shielded by Wisconsin's defense doctrine of assumption of the risk.

New Jersey has approved the use of written interrogatories in situations in which the trial court wished to have the portion of negligence attributable to settling defendants submitted to the jury even though they were no longer parties to the action. *Theobald v. Angelos*, 44 N.J. 228, 208 A.2d 129 (1965). Although the decision was not made under the comparative negligence doctrine, the procedure utilized could be effectively applied to the Texas practice of allowing jury consideration of all tortfeasors. See also Comment, *Torts—The Right to Contribution and the One Satisfaction Rule: Credit for Settlement by Co-Defendant*, 21 *RUTGERS L. REV.* 130 (1966); accord, *Payne v. Bilco Co.*, 54 Wis. 2d 345, 195 N.W.2d 641 (1972) (reaffirming principle of *Pierringer* in upholding special verdict of nonparty, settling defendants to prevent prejudice to nonsettling defendants).

Walton, however, *Pierringer* did not contravene any statutory language. The broad language in Wisconsin's comparative negligence statute has enabled a relatively free judicial development of other comparative negligence problems in that state.¹¹¹ Texas, in contrast, has specifically provided that separate contribution suits are allowed¹¹² and that the issue of negligence of settling tortfeasors may not always be before the jury.¹¹³

Texas courts traditionally have been reluctant to act as a super-legislature. Indeed, Texas courts have held that "every word or phrase in a statute is presumed to have been used intentionally with a meaning and purpose, and when a word has a settled legal significance, it is presumed to have been used in that sense."¹¹⁴ In addition, the length and specificity of provisions and formulas stated in article 2212a would seem to discourage judicial intervention, especially when contrasted with the broad statutory wording of most states' comparative negligence statutes which leave to the judiciary resolution of emerging problems. Nevertheless, judicial approval of the insistible party concept¹¹⁵ would be useful in bringing in not only those who have settled, but also nonparty nonsettlers, on the theory that only by apportioning the negligence of all can complete relief be dispensed. Such reasoning would leave the exception clause of section 2(g) generally unused, except for those instances in which jurisdiction, though not possible at the time of suit, was later obtained and when default judgments had been obtained based on deficient service of process. Significantly, this change may be possible without legislative action because the Supreme Court of Texas, when announcing rules of practice and administration in comparative negligence practice, could effect procedural changes¹¹⁶ to liberalize joinder.¹¹⁷ Unfortunately, given the completeness of the statutory language of the settlement formulas and prior judicial restraint, the courts may wait for the legislature to modify sections 2(d) and 2(e), as well as the current multi-

111. WIS. STAT. ANN. § 895.045 (Supp. 1977-78). See also V. SCHWARTZ, *supra* note 3, at 38-39, which suggests that the tendency to adopt broadly worded statutes stems from reliance on early comparative negligence statutes of Mississippi and Wisconsin, which were simply phrased. *Id.* at 39 n.54.

The California Supreme Court, in adopting a pure comparative negligence form, mentioned, without resolving, the issue of whether the trier of fact should be permitted to apportion fault when the plaintiff has not sued all who are potentially responsible for his injury. As a result, defendants under California impleader actions face a problem of total negligence apportionment where a settling party is involved. The court, however, indicated a willingness to correct problems judicially as they presented themselves: "Our decision in this case is to be viewed as a first step in what we deem to be a proper and just direction, not as a compendium containing the answers to all questions that may be expected to arise." *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 826, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975). See generally Comment, *Judicial Adoption of Comparative Negligence—The Supreme Court of California Takes a Historic Stand*, 51 IND. L.J. 281 (1976).

112. Art. 2212a, § 2(g).

113. *Id.* §§ 2(d), 2(g).

114. *First Nat'l Bank v. Farmers & Merchants State Bank*, 417 S.W.2d 317, 329 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.); accord, *McBride v. Clayton*, 140 Tex. 71, 76, 166 S.W.2d 125, 128 (1942); *Koy v. Schneider*, 110 Tex. 369, 403, 221 S.W. 880, 886 (1920); *Stephenson v. Nichols*, 286 S.W. 197, 200 (Tex. Comm'n App. 1926, judgment adopted).

115. See note 61 *supra* and accompanying text.

116. See TEX. REV. CIV. STAT. ANN. arts. 1730, 1731a (Vernon 1962).

117. Green & Smith, *Negligence Law, No-Fault, and Jury Trial—IV*, 51 TEXAS L. REV. 825, 835, 839 (1973). The authors suggest that Texas courts could have acted to adopt the doctrine of comparative negligence judicially.

party practice in comparative negligence situations.¹¹⁸ Indeed, the Texas Supreme Court has warned of future difficulties in applying article 2212a as presently written. Nevertheless, the court expressly deferred to legislative action the problem of resolving statutory deficiencies through study and amendment.¹¹⁹ In that event, the Texas Legislature should reform article 2212a to accomplish the goal of the Sixty-third Legislature, which was to further fairness and equity in determining the rights and responsibilities of those involved in negligence cases.¹²⁰

V. CONCLUSION

Whether by judicial or statutory revision, Texas needs to change its comparative negligence law because the present joinder and settlement provisions of article 2212a frustrate the objective of the Act by encouraging both plaintiffs and defendants to engage in joinder ploys.¹²¹ Reform should require jury consideration of the actions of all tortfeasors. For a fairer allocation of damages, the courts should additionally apply the formula set forth in section 2(e) in all instances where a settling tortfeasor is found negligent. Such changes would strengthen the goal of a comprehensive, truly comparative negligence system.

118. See 40 TEX. JUR. 2D *Negligence* §§ 85, 110 (1976), predicting future legislative adjustments to the Act.

119. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 863 (Tex. 1977).

120. Commentators predicted at the time of enactment the appearance of problems requiring legislative rectification and expressed confidence that the legislature would respond by refining the statutory model in order to attain this goal. Abraham & Riddle, *supra* note 6, at 421.

121. Adams, *supra* note 27.

